

- "3. The nature and extent of claimant's disability.
- "4 The amount of compensation due claimant as a result of disability from the 1/16/96 accident.
- "5. Whether claimant is entitled to temporary total disability compensation from April 22, 1996 through June 28, 1996.
- "6. Whether claimant's medical bills (itemized in claimant's Exhibit '1' to the Regular Hearing transcript) should be paid by respondent as authorized medical expenses; if not, whether a portion should be paid as unauthorized medical expense."

In claimant's brief to the Board, however, he stated that "[a]lthough a number of issues are listed in the Application for Review, the dispositive issues on appeal are:

- "1. Whether claimant's accidental injury arose out of and in the course of his employment with respondent on January 16, 1996.
- "2. Whether claimant gave timely notice and written claim to his employer."

The brief of respondent acknowledged under its "STATEMENT OF FACTS" that "[c]laimant was employed by Cates Sheet Metal and was injured in a work-related accident on November 6, 1995." The Board understands this statement to be an admission or stipulation by respondent that claimant suffered personal injury by accident that arose out of and in the course of his employment with respondent. Therefore, those issues are no longer in dispute and need not be decided.

The Assistant Director denied claimant an award based upon a finding that claimant did not provide timely notice. As a part of that determination, the Assistant Director found claimant's date of accident was on or about November 6, 1995. Accordingly, the issues for Appeals Board review are date of accident and notice.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire evidentiary record and the briefs of the parties, the Appeals Board finds that the Award by the Assistant Director should be affirmed.

Claimant initially alleged an accident date of November 6, 1995. This was subsequently amended to allege his accident occurred on January 16, 1996.

Respondent, in its brief, admits that "[t]he claimant's supervisor, Vern Thomas, was put on notice of the claimant's injury sometime between December 21, 1995 and

January 21, 1996" Therefore, if claimant's accident date was on January 16, 1996, then notice would have been timely given within the 10-day statutory requirement. K.S.A. 44-520 provides:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

As stated, the Assistant Director found an accident date of November 6, 1995. The Assistant Director also found that notice was provided on January 19, 1996. Although this notice was found not to have been timely, it was exactly 75 days after the date of accident. Therefore, if claimant established just cause for his failure to give notice within 10 days, then even with the accident date found by the Assistant Director, the notice given on January 19, 1996, would have been timely. The Assistant Director's Award is silent as to just cause. Although claimant alleged just cause, it was not established. Instead, claimant's argument throughout was that he gave notice within 10 days. Based upon this assertion and for the reasons stated in the Assistant Director's Award, the Appeals Board finds that notice was not timely. Because claimant failed to prove that he gave notice within 10 days or that he had just cause for his failure to do so, the denial of benefits by the Assistant Director is affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated December 4, 1997, entered by Assistant Director Brad E. Avery, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy V. Pickell, Westwood, KS
Sean B. Summers, Kansas City, MO
Brad E. Avery, Assistant Director
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director